E-015/M-89-50 GRANTING A VARIANCE AND REQUIRING MINNESOTA POWER AND LIGHT TO CONSULT PRIOR TO IMPLEMENTING CHANGES IN THE OPERATION OF ITS FUEL ADJUSTMENT CLAUSE

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Patrice Vick	Commissioner

In the Matter of a Petition from Minnesota Power and Light For a Declaratory Ruling or, in the Alternative, for a Variance Regarding Certain Fuel Purchases Used for Off-System Energy Sales

ISSUE DATE: February 7, 1990

DOCKET NO. E-015/M-89-50

ORDER GRANTING A VARIANCE AND REQUIRING MINNESOTA POWER AND LIGHT TO CONSULT PRIOR TO IMPLEMENTING CHANGES IN THE OPERATION OF ITS FUEL ADJUSTMENT CLAUSE

PROCEDURAL HISTORY

On February 2, 1989, Minnesota Power and Light (the Company) filed a Petition for Declaratory Ruling or, in the alternative, a variance from the fuel adjustment rules.

On August 2, 1989, the Commission denied the Company's request for a declaratory order but granted the Company a variance from the fuel adjustment rules permitting the Company to use its proposed accounting and rate treatment regarding off-system sales occurring after the date of the Order. However, the Commission found that the record was insufficient to decide whether to apply this variance to four off-system sales made prior to the August 2, 1989 Order or to order refunds due to the Company's use of an unauthorized accounting method and rate treatment with respect to the four off-system sales which occurred before receiving the August 2, 1989 variance. Therefore, the Commission ordered the Company to file additional information detailing the amounts collected through the fuel adjustment clause using its alternate method compared to the amounts that would have been collected applying the method authorized by the rules. In the Matter of a Petition from Minnesota Power and Light For a Declaratory Ruling or, in the Alternative, for a Variance Regarding Certain Fuel Purchases Used for Off-System Energy Sales, Docket No. E-015/M-89-50, ORDER VARYING RULE AND REQUIRING FILING (August 2, 1989).

The Company made its compliance filing on September 18, 1989. On October 27, 1989,

Superwood, a customer of the Company, filed comments arguing that the Company had overstated the benefits to ratepayers of its proposed practice. Superwood urged the Commission to deny the Company's request for a variance regarding the pre-August 2, 1989 sales and to order a refund.

On November 1, 1989, the Department of Public Service (the Department) filed comments recommending that the Commission grant the variance as requested by the Company.

The matter came before the Commission on November 27, 1989. In oral argument before the Commission, in addition to the arguments already on file, Superwood argued that granting retrospective application to the Company's variance would constitute illegal retroactive ratemaking.

FINDINGS AND CONCLUSIONS

The Commission may grant retrospective effect to variances on the same basis that it grants prospective variances: Minn. Rules, part 7830.4400. The Commission will grant a variance to any of its rules in an instance where it appears to the satisfaction of the Commission that:

> A. enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
>
> B. granting of the variance would not adversely affect the public interest; and
>
> C. granting the variance would not conflict with standards imposed by law.

In examining the totality of the circumstances and considerations delineated by its variance rule, the Commission finds that the Company has successfully demonstrated that retrospective application of a variance from the requirements of the fuel adjustment rules is warranted, as the following analysis shows:

Excessive Burden: In its previous August 2, 1989 Order, the Commission found that the Company's proposed accounting and rate treatment of off-system sales was inconsistent with the Commission's automatic fuel adjustment rules, but also found all the facts necessary to grant a prospective variance. Among its findings, the Commission stated:

> No party to this proceeding has disputed the potential benefits to ratepayers and the Company from the increased sales made possible by designating lower cost fuel to the specific off-system sales. MP&L, Docket No. E-015/GR-89-50, ORDER VARYING RULE AND REQUIRING FILING, at p. 6.

The Commission found that the amount of benefits actually flowed through to ratepayers because of these sales was approximately $2.2 million. MP&L, Docket No. E-015/GR-89-50, ORDER VARYING RULE AND REQUIRING FILING, at p. 6.

The only additional information the Commission required prior to determining whether to grant retrospective application to the variance or order a refund was the amount which the Company had collected from its ratepayers using the unauthorized accounting method compared to the amount it would have collected had the proper method been used. The Commission ordered the Company to supply this crucial information within 30 days. MP&L, Docket No. E-015/GR-89-50, ORDER VARYING RULE AND REQUIRING FILING, at p. 8.

On September 18, 1989, the Company made its compliance filing
which showed that if the Company had applied the authorized accounting and rate treatment methods to these sales, the rates charged the customers would have been reduced by only $855,000.00. While the $855,000 figure not passed on to its customers because of the unauthorized accounting method is hardly insignificant, it is relatively small in relation to the $2.2 million in benefits that the Company realized through these sales and flowed through to its customers because of the unauthorized accounting method. MP&L, Docket No. E-015/GR-89-50, ORDER VARYING RULE AND REQUIRING FILING, at p. 6.

Accordingly, the Commission finds that, when all the financial impacts of this unauthorized practice are taken into account, the unauthorized practice did not result in overcharging the ratepayers but instead resulted in substantial net monetary gain for the Company's ratepayers. In light of such substantial net benefits for the ratepayers accruing from the unauthorized practice and no ill-gotten windfall for the Company, strict enforcement of the fuel adjustment rule by requiring refunds of the $855,000.00 would constitute an "excessive burden" upon the Company.

Public Interest: Since the Company has shown that its unauthorized practice has produced substantial net benefits for its ratepayers, the Commission does not believe that is it necessary to penalize the Company by requiring a refund of the $855,000.00 to defend the public interest. In granting a prospective variance in the August 2, 1989 Order, the Commission has already found that the Company's alternate methods do not violate the public interest in and of themselves. In this case, the ratepayers are not out-of-pocket but indeed have benefited substantially from the Company's unauthorized practice. Under these circumstances a refund to the ratepayers would be an unwarranted windfall and not serve the public interest. Equally important to the Commission's determination of the public interest, the Company has displayed a positive attitude, admitting its shortcomings in this matter and acknowledging that it should have consulted with Commission staff before proceeding with its alternate methods. In light of this attitude, the Commission believes that an order that the Company consult with the Department and Commission staff before implementing changes in its fuel adjustment clause will be an appropriate remedy to safeguard the Company's customers from a recurrence of unauthorized activity in violation of the fuel adjustment clause.
Consistent With Legal Standards: The final standard for granting a variance is that it not violate any standards imposed by law. Minn. Rules 7830.4400 (3). Superwood argues that granting the variance sought by the Company herein would violate of Minn. Stat. § 216B.16 and constitute retroactive ratemaking. Superwood's argument is without merit.

Superwood presented its basic "illegal ratemaking" argument in its March 24, 1989 filing, arguing that the Company's fuel adjustment clause is a "rate" and as such the Commission may not change it without following the statutory rate change procedure set forth in Minn. Stat. § 216B.16. Stated

in the context of the variance standards, Superwood's argument is that a variance to the Commission's fuel adjustment rule which would result in changing the charges collected under the Company's fuel adjustment clause without following the statutory procedures for changing a "rate", would indeed conflict with a "standard imposed by law", i.e. the procedures required by Minn. Stat. § 216B.16. As such, it would be impermissible under the third standard for granting variances.

Superwood's argument, if sound, would have prohibited the prospective variance granted by the Commission in its
August 2, 1989 Order because that variance was clearly adopted without recourse to the rate change procedures prescribed in Minn. Stat. § 216B.16. In its August 2, 1989 Order, the Commission impliedly rejected Superwood's "illegal ratemaking" argument and Superwood has not sought to overturn that decision.

During the meeting held to consider granting retrospective effect of the variance, however, Superwood's oral argument revived its "illegal ratemaking" argument in slightly altered form, this time characterizing the retrospective variance as "illegal retroactive ratemaking." In this Order, the Commission specifically rejects Superwood's argument. Minn. Stat. § 216B.16, Subdivision 8 specifically removes fuel adjustment matters from the strictures of the formal rate-setting process:

> Notwithstanding any other provision of this chapter, the commission may permit a public utility to file rate schedules containing provisions for the automatic adjustment of charges for public utility service in direct relation to changes in: (1) federally regulated wholesale rates for energy delivered through interstate facilities; (2) direct costs for natural gas delivered; or (3) costs for fuel used in generation of electricity or the manufacture of gas.

In administering its oversight responsibilities under this provision, the Commission has adopted it fuel adjustment rules, including Minn. Rules 7825.2400, Subparts 8 and 9 which are at issue herein. These rules, like all the Commission's rules, are susceptible to variance in accordance with the Commission's variance rule, Minn. Rules 7830.4400. See also: Minn. Stat. § 14.05, Subd.4 (1988). As such, the variance as proposed by the Company does not violate Minn. Stat. § 216B.16 as argued by Superwood nor does it violate an other legal standard known to the Commission.

Under these particular circumstances, the Commission concludes that denial of the variance and strict application of the rule to the "prior" sales would impose an excessive burden on the Company, that applying this variance to these sales would not adversely affect the public interest, and that granting this variance conflicts with no standards imposed by law.

Accordingly, the Commission will give retrospective effect to the variance from the fuel adjustment rule that it granted the Company in its August 2, 1989 Order. However, as previously indicated, the Commission will require the Company to consult with the Department and Commission staff before implementing changes in its fuel adjustment clause. It is to be understood, of course, that the Commission remains the arbiter of its own rules and all matters under its jurisdiction and staff are under no obligation by reason of this Order to provide advisory opinions regarding any matter. The Commission is not bound by any advice which its staff or the Department may give to the Company (or any party) pursuant to this Order or otherwise, though the fact of having sought and received

such advice may have a bearing on the good faith of the Company's subsequent actions.

ORDER

1. Minnesota Power and Light Company's request for a variance from the requirements of Minn. Rules 7825.2390 et seq. allowing it to deviate from the rule's accounting method and rate treatment and specifically allowing its use of lower cost spot-market coal in pricing off-system sales with respect to the four pre-August 2, 1989 off-system sales considered in this matter is granted.

2. The Company is hereby instructed and hereafter shall consult staff of the Commission and the Minnesota Department of Public Service before implementing changes in its fuel adjustment clause.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Lee Larson
Acting Executive Secretary

(S E A L)